No. 397

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF ON BEHALF OF LESLIE G. GOUDIE

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STATEMENT.

We shall not repeat the applicable points and authorities relied upon by the other defendants herein, but shall ask this court to assume that the positions stated by each of them are adopted by this defendant (Leslie G. Goudie) as though specifically included herein.

This indictment contains 4 counts, Count I charges an unlawful combination and conspiracy to arbitrarily fix, maintain and control artificial and non-competitive prices to be paid to all producers for fluid milk (R. 11, p. 47).

Count II charges a similar combination for the sale by distributors in the City of Chicago of fluid milk shipped into the City (R. 17, p. 63).

Count III is not involved in this appeal (Brief for U. S., p. 11).

Count IV charges the defendants unlawfully have combined and conspired with one another to limit control and restrain and obstruct the supply of fluid milk moving in channels of interstate commerce (R. 25, par. 88).

The indictment specifically describes Leslie G. Goudie and charges him with doing specific things, namely:

> "Leslie Goudie has been, throughout the period covered by this indictment, and now is, president of the Joint Council No. 25 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, an affiliation of the American Federation of Labor, and is hereby indicted and made a defendant herein. The Joint Council is an advisory body to the forty-seven local unions comprising all of the teamsters' and chauffeurs' unions in the City of Chicago, including Local 753, and is composed of the officers of each local union" (R. 10, par. 41).

In each count Leslie Goudie is charged with "acting in concert with the other defendants and pursuant to and in execution of the combination and conspiracy hereinbefore alleged, * * * did: (1) counsel, advise and direct the defendant Local 753 and the officials and agents of Local 753 with respect to the acts described in paragraph * * * above; (ii) through the instrumentality of the Joint Council of the International * * * prevent the delivery of daily supplies of meat, bread, bakery products,

vegetables, and other foods by members of unions affiliated with the said Joint Council to places of business served by the independent distributors who refused to purchase fluid milk at the prices fixed and determined as aforesaid" (R. 15, 19, 23, 28).

Thus, the indictment first charges that Goudie is president of the Joint Council which is *only an advisory body,* and in each count charges that through the instrumentality of this *advisory body,* over which Goudie merely presided as president, he did counsel, advise and direct officials and agents of Local 753, which union was a member of this advisory body.

Congress never intended that the Sherman Anti-Trust Act of 1890 should ever apply to labor unions.

Since the inception of the Sherman Anti-Trust Act, labor generally and labor unions in particular, have considered themselves from without the scope of its prohibitions. Labor unions have constantly denied that its activities, whose essential purpose is its struggle for the betterment of their working conditions, improvement in hours and striving to secure for their members and workers generally, wages that will equal the best American standard of living, are ever subject to the Sherman Act. With approximately 10,000,000 members of organized labor firmly of this belief, and chafing under the unreasonable restraint imposed upon them by the courts and threats of prosecution by government agencies while in the furtherance of their legitimate activities, it is of prime importance that this Court consider and fully pass upon these questions:

(1) Was the Sherman Act intended to cover trade union activities, and

(2) Have not the decisions of the Courts holding that

the Act was so intended been based upon an erroneous premise, and therefore should be overruled and set aside.

There can be no dispute about the fact that the agitation which led to the passage of the Sherman Anti-Trust Act of 1890 was the desire to eliminate the evils of business trusts, and business monopolies. Judge Billings in *U. S.* v. *Workingmens Amalgamated Council of New Orleans*, 54 Fed. 994, 996 (1893) so found when he said: "I think the Congressional debates show that the statute had its origin in the evils of massed capital * * *". However, Judge Billings continued and said: "* * * but when the Congress came to formulating the prohibition which is the yardstick for measuring the complainants' right to the injunction * * * (the) subject had so broadened in the minds of the legislators that the source of evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as capital * * *".

Here we have the nub of the controversy. Did the subject so broaden in the minds of the legislators as to include combinations of labor?

It is *conceded by all that* the primary object of all bills introduced in Congress relating to unlawful combinations in restraint of trade were aimed at evils growing out of great industrial trusts.

It is true that this Court in *Loewe* v. *Lawlor*, 208 U. S. 274, 301 (1908) has said:

> "The records of Congress show that several efforts were made to exempt, by legislation, organization of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us."

This Court has bottomed its decisions upon two facts: (1) that efforts to exempt laborers from the operation of the act failed, and (2) that it was from the present act that these amendments were refused. If these are found historically to be incorrect, then it must be conceded that the holding of the court was not justified. Therefore, we must revert to a study of the anti-trust bills presented to Congress and the debates in relation thereto.

Bills introduced prior to 1890.

The present Anti-Trust Act was passed in 1890. Most of the anti-trust measures introduced prior to the passage of the Sherman Act, for the purpose of making the restraint upon trust more effective, *declared against combinations the tendency of which would be to raise prices,* and every such bill directed against price fixing combinations contained provisos exempting labor and farm operations from their operation. After the passage of the Sherman Act, bills with the same provisions as to price raising combinations and labor and farmer organization exemptions were introduced by Senator George, Representatives Lane, Blanchard, McRoe and Tucker in 1892 and later in 1898.

(Bills and Debates, pp. 411, 417, 431, 433, 437, 441, 449, 451, 465, 469, 473, 477, 481 and 581.)

On August 14, 1888, Senator Sherman introduced a bill entitled "A bill to declare unlawful trusts and combinations in restraint of trade and production", Section 1 provided that "all arrangements between persons or corporations made with a view, or which tend, to prevent full and free competition * * * or which tend to advance the cost to the consumer of * * * articles, are hereby declared to be against public policy, unlawful, and void".

On September 11, 1888, this bill was reported out of the Committee on Finance in an amended form by Senator Sherman.

(Bills and Debates Relating to Trusts. No. 147, Senate Documents, Vol. 14, 57th Congress, 2nd Session, pp. 11-13.)

On February 4, 1889, the bill was reached for debate in the Senate. Senator George, who was desirous that labor and farm organizations should not be effected by an attempt to restrain monopolies, said:

"(This) bill not only prevents combinations between farmers to raise the price of their products, but it would (though not so intended by the framers) embrace combinations among working men to increase the amount of their wages. For an increase in their wages would tend to increase the price of product to the consumer, and thus would come within the express term of the bill."

(Congressional Record, 50th Congress, 2nd Session, Vol. 20, page 1459.)

This statement was apparently sufficient to cause the bill to be abandoned for nothing further was done in the 50th Congress with reference to this bill.

Introduction of bills which lead to present act.

Senator Sherman, on December 4, 1889, introduced into the 51st Congress another bill entitled "A Bill to declare unlawful trust and combinations in restraint of trade and production". This was referred to the Committee on Finance of which Senator Sherman was Chairman. On March 18, 1890, it was reported out of Committee and Section 1, read as follows:

"That all arrangements, contracts, agreements, trusts or combinations between two or more citizens or corporations * * * of different states * * *

made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into the United States, or with a view or which tend to prevent full and free competition in articles of growth, production or manufacture of any State * * * or in the transportation or sale of the article * * * and all arrangements, trusts, or combinations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful and void * * *."

(Bills and Debate, pp. 69, 71; 89.)

On March 21, 1890, when the measure was being debated, Senator Sherman spoke for the measure and in his statement clearly pointed out that the only combinations that the bill intended to reach were combinations of a business nature.

(Congressional Record, Vol. 21, pp. 2455-2474.)

On March 21, 1890, Senator Reagan offered a substitute to be added to the Sherman bill, the important part of which was section 4, which declared that "a trust is a combination of capital, skill or acts of two or more persons, firms or associations of persons, or any two or more of them, for either, any, or all of the following purposes": (1) to carry out restrictions of trade, (2) to limit production or to increase the price of commodities, (3) to prevent competition in manufacture, purchase, sale or transportation of commodities, (4) to fix a standard or figure for the purpose of controlling prices, (5) to create monopoly in manufacture, purchase, sale or transportation, and (6) to enter into a contract of any kind for the purpose of restricting competition, setting prices, etc.

(Cong. Rec., Vol. 21, p. 2560.)

This amendment for the first time directly approached in language a possible construction aimed at labor and

labor organization, when section 4 defined a "trust", as a "combination of capital, *skill*" * * *.

If it was the intention of Congress to include labor organizations in the final bill as it was later drafted by the judiciary committee, it had before it language which would have clearly and unequivocally expressed that intent by the use of a definition of a "trust" as in the Reagan amendment and the use of the word "skill", which refers to labor, as his product was his skill at a given trade which he could use or refrain from using as an individual or through his association with others in a labor union for the betterment of his wages, hours and conditions of employment. The omission in the final act to clearly so state, and on the other hand, the limitation of the word "trust" to its ordinary accepted meaning of an industrial combination, by the elimination of the word "skill" from its definition showed a definite intention on the part of the framers to omit labor unions and their officers.

Debate relating to labor and exemption proviso.

On March 24, when the Sherman Act and the Reagan Amendment was being debated, Senator George was one of the first to raise the question as to whether the bill if enacted into law would not interfere with union activities. He said:

> "The object of that organization (Knights of Labor), as I understand * * * is to increase the price of their wages. Now increasing the price of wages has a tendency, in the language of this bill, to increase the price of the product of labor."

He then asked Senator Sherman the direct question: "Are they not also included * * * in the bill of the Senator from Ohio"?

Senator Teller was also very much concerned with this aspect, for he said:

> "I know that nobody here proposes to interfere with the class of men (laborers and farmers) I have mentioned * * *. And while I am exceedingly anxious to join in anything that shall break up and destroy unholy combinations (trusts) * * * I want to be careful that in doing that we do not do more damage than we do good. * * * Therefore, I suggest that the Senators who have this subject in charge give it special attention, and by a little modification it may be possible to relieve the bill of any doubt on this point".

Poised with these pointed and direct questions, and sensing the concern of the senators concerning the possible scope of the bill, and being called upon specifically to answer the question: Does the language of the bill necessarily cover the activities of organized labor? Senator Sherman, as the sponsor of the bill, answered the question emphatically:

> "Combinations of workingmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, *are not affected in the slightest degree*, nor can they be included in the words or intent of the bill now reported". (Italics ours.)
>
> (Congressional Record, Vol. 21, pt. 3, 51st Congress, pp. 2560 to 2562.)

So concerned was the Senate that by no possible stretch of the imagination a contra result would be obtained, that Senator Teller, then said:

> "(It) would reach to nearly every transaction in life and would be particularly oppressive upon the struggling masses who are making combinations to resist accumulated wealth * * *. *It is not the intention of anybody here to make that construction of it;* we are trying to remedy the evil; but it is very

probable that if this bill were passed the very first prosecution would be against combination of producers and laborers whose combinations tend to put up the cost of commodities to consumers." (Italics ours.)

(*Ibid*, pp. 2565.)

No Senator challenged the assertion that "it is not the intention of anybody here to make that construction of it." This is significant. When a state of mind or an intention is shown to exist with reference to a legislative subject matter, it continues to exist unless a clear showing to the contrary can be presented. The ensuing debates are entirely devoid of any indication that any senator desired to see a measure passed which in any manner would hinder or affect labor unions.

Despite the unqualified assurance of Senator Sherman that organized labor was immune from the phraseology of the bill, the anxiety of several members of the Senate, notably, Senators Hoar, George and Stewart, was not allayed. They were vitally concerned lest the "first prosecutions" would be against combinations of laborers and producers. (Remarks of Senator Stewart, *Ibid*, pp. 2565, 2606; also Senator Morgan, p. 2609.) It was stated that with all due respect to the efforts towards controlling and curbing industrial trusts, they wanted further guarantees that it was not the intention of the bill that the "natural and inherent right" of organized labor would be interfered with.

The Senate thereafter acting as a Committee of the whole, adopted the Reagan Amendment (Cong. Rec., Vol. 21, p. 2611). Thereafter Senator Sherman offered a proviso exempting labor and farmer organizations from the operation of the bill. He stated:

"I do not think it necessary, but at the same time,

to avoid any confusion, I submit it to come in at the end of the first section."

The amendment was adopted without the formality of a roll call and read:

> "Provided: That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers, made with the view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture, made with a view of enhancing the price of their own agricultural or horticultural products."

On March 26th Senator Aldrich offered an additional amendment for the purpose of exempting labor, to be added after the first section, which was likewise adopted with a roll call, it read:

> "Provided, further, that this act shall not be construed to apply to or declare unlawful combinations or assocations made with a view or which tend, by means other than by a reduction of the wages of labor, to lessen the cost of production, or to reduce the price of any of the necessaries of life, nor to combinations or associations made with a view or which tend to increase the earnings of persons engaged in any useful employment."

Thereafter a series of amendments were adopted which was believed to encumber the bill, and on March 27, after Senator Platt stated that much of the bill was probably unconstitutional and that, "The conduct of this Senate for the past three days—and I make no personal illusions—has not been in the line of the honest preparation of a *bill to prohibit and punish trusts* * * *" the bill was referred to the Judiciary committee with instructions to report in 20 days.

On April 2, 1890 (about 6 days later), the Committee

reported the Sherman bill back to the Senate, with a recommendation that everything after the enacting clause be stricken out and that the measure formulated by the committee be substituted; as thus reported the bill was identical with the present Sherman Anti-Trust Act.

Of this, Professor Edward Berman, in his "Labor and the Sherman Act", observes on page 31:

> "It should be noted that absolutely no mention was made in the Senate debates, after the Judiciary Committee had reported, of the applicability of the bill to labor and farmers' organizations. The entire attention of the senators appeared to be directed to a single question, 'Was or was not the measure well suited to restrain the undesirable activities of business combinations?' In view of the fact that the applicability of the original Sherman bill and of the Reagan amendment to labor and farmers' organizations was much in the foreground in the debates on those measures, the silence concerning this matter in the debates on the Judiciary Committee substitute should be considered pertinent."

Continuing this thought, Professor Berman on page 33 states:

> "It has already been pointed out that there was no discussion in the House of Representatives as to whether the Senate bill applied to farmers' and labor unions. Such organizations were mentioned, however. Representative Stewart, in the debates of June 11, 1890, criticized the Bland amendment because he thought it would prevent all agreements between railroads. He expressed the opinion, since widely accepted, that unrestricted competition among the railroads was harmful to all classes. In the course of his argument he made the following remarks:
>
> > 'Why do the laborers organize and combine to put up the price of labor, and so enhance the cost of everything to the consumer? Because of excessive competition. Yet my friend from Missouri (Rep. Bland) does not propose to apply

> any remedy in that direction. Nothing more largely affects the cost of articles to every consumer * * * than the combinations of labor. Who complains of it? I do not. I think the laborer is justified, where competition is excessive * * * in entering into combinations for self protection * * *.' Cong. Rec. Vol. 21, p. 5956.

A careful examination of the House debates fails to produce any other extended references to labor and farmers' organizations. It appears significant that the foregoing discussion by Representative Stewart assumed as a matter of course that the Judiciary Committee bill did not extend to such organizations, and that Mr. Stewart, who represented the House on the conference committee which negotiated the final agreement as to the adoption of the Anti-trust Act, declared that he had no objection to labor and farmers' organizations."

From the foregoing, it is apparent that there is absolutely no evidence that "when Congress came to formulating the prohibition * * * (that the) subject had so broadened in the minds of the legislators that the source of evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor, as well as capital" as held in *U. S. v. Workingmens Almag. Council*, 54 Fed. 994, 996. The facts are that Congress at all times showed a firm intention that labor unions were not included or to be included, as evidenced by the unqualified statement of Senator Sherman, the sponsor of the Act.

As has been pointed out, the Sherman Bill as reported from the Finance Committee and the Reagan Amendment prohibited all combinations, the effect of which was to increase the price of commodities to consumers. It was this provision against price raising that caused Senators Hiscock, Teller, George, Stewart and Morgan to fear the effect of this proposal on farmer and labor organizations.

They each pointed out that such organizations tend to increase prices, and hence their activities might be interfered with. To meet this, Senator Sherman, although he thought it unnecessary, offered a proviso exempting labor organizations, which was adopted without a roll call. It was so worded as to meet the objection that the anti-price raising provision would embarrass labor and farmers' unions. Senator Aldrich followed the next day with a further proviso which exempted combinations or associations made with a view, or which tend to increase the earnings of persons engaged in any useful employment, which also was adopted without roll call.

It is true that on March 27th, Senator Edmunds objected to a bill which permitted labor to combine to raise wages and thus costs, but which at the same time, in his belief, prohibited combinations of employers to pass these costs to the consumer, to which Senator Hoar vigorously replied and pointed out the essential differences in the two combinations and the unions' lack of economic equality in the struggle.

The final bill, as reported by the judiciary committee, declared unlawful combinations in restraint of interstate trade or commerce which monopolizes or attempts to monopolize such trade and commerce. The bill was entirely silent about combinations to increase prices, though the original bill contained the labor proviso exempting certain combinations, whose tendency it was to increase prices. Certainly there is no valid reason why such provisos should have been included in this new bill. Thus we have the Senate unanimous in its desire to exempt labor from the provisions of the bill and there is no reason appearing in the record to indicate any change of mind in the six days. Is it not reasonable to assume that when the final bill was drafted that they believed it unnecessary to in-

clude a labor exemption clause for the simple reason that in the form in which the bill was finally reported out and from its language they believed labor would not be affected?

Both Senators George and Hoar, determined supporters of the position that labor should be exempted from the Anti-Trust Act were members of the judiciary committee which drew the final bill. They supported the bill on the floor of the Senate. Though nothing was said, every previous utterance on their part showed a definite adherence to the position that labor was not included. There is nothing in the records of the debates of Congress which indicated that the Senators who were supporting labor had changed their mind about the desirability of drawing a bill which did not include labor.

The title of the Sherman Bill, which condemns so-called restraint of competition was "A Bill to Declare Unlawful Trusts and Combinations in Restraint of Trade and Production." This was the title during all the discussions on whether the bill would apply to labor. If the Senate, when it passed the final bill containing a denunciation of "restraint of trade," meant by including such a denunciation, to have the bill embrace the acts of labor unions, it is fair to assume that Senator Sherman meant the same thing when he entitled his bill one to declare unlawful "combinations in restraint of trade and production"; yet, as he expressly declared on the floor of the Senate, he did not believe that it embraced labor unions.

What was not presented to this Court in Loewe v. Lawler.

Professor Berman in his "Labor and the Sherman Act", pages 81 to 85, points out that there is no evidence available to show that counsel for the Hatters' directly raised the point that Congress did not intend that the act

should reach labor unions. The only position of theirs which had even a slight bearing on the question, was that which asserted that since the workers were not engaged in interstate commerce, had no aim to restrain it, and had no means which directly did so, the Sherman Act did not affect them.

Counsel for the Loewe Company devoted the final section of their brief to a defense of the proposition that "members of a combination or a conspiracy under the anti-trust law are not exempt because they are not engaged in interstate transportation." They presented the proposition that Congress had refused to exempt labor unions from the provisions of the Sherman Act. They pointed out that the early bills introduced by Senators Reagan and Sherman contain no exemptions of labor unions; that Senator George on February 4, 1889 and Senators Teller and Hiscock on March 24, 1890, expressed the belief that the Sherman Bill which was before the Senate on those dates, would reach labor unions; and on March 25, 1890, Senator Sherman, in order to meet these objections, introduced an exemption provision, which was adopted. The brief of the Loewe Company then proceeded with the following:

> "Subsequently, on March 27, 1890, the bill, as amended, was recommitted to the Senate Committee on Judiciary, which on April 2, 1890, reported a substitute bill, which *wholly omitted the amendment exempting organizations of farmers and laborers, and this bill, as reported, became a law on July 2, 1890.* (Italics in the brief.) The exempting amendment was, however, not omitted until there had been a debate as to the propriety of discriminating in favor of labor organizations, in which Senators Stewart, Hiscock, Hoar, Teller and George, participated. It is significant that after the Sherman law was enacted bills were introduced in the Fifty-second Congress, H. R. 6640, Sec. 1; 55th Congress, Senate 1546, Sec. 8; H. R.

10539, Sec. 7; 56th Congress, H. R. 11667, Sec. 7; 57th Congress, S. 649, Sec. 7; H. R. 14947, Sec. 7, to amend the Sherman Anti-trust Law so that it would be inapplicable to labor organizations, and while one of these (H. R. 10539, Sec. 7) passed the House in the 56th Congress, none ever became a law.

Congress, therefore, has refused to exempt labor unions from the comprehensive provisions of the Sherman law against combinations in restraint of trade, and this refusal is the more significant, as it followed the recognition by the Courts that the Sherman Anti-Trust Law applied to labor organization." (Italics in the brief.)

The brief then proceeded to quote from the decision in *United States* v. *Amalgamated Council* to the effect that Congress had "made the interdiction include combinations of labor, as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them." The decisions rendered in the Pullman cases were also discussed in support of the plaintiff's position.

Immediately preceding the presentation of the legislative history of the act the brief contained the following assertion: "Congress did not provide that one class in the community could combine to restrain interstate trade and another class could not. It had no respect for persons. It made no distinction between classes. It provided that '*every*' contract, combination or conspiracy in restraint of trade was illegal."

The Supreme Court thus had presented to it by the counsel for the company the proposition that the hatters' combination, as a labor union, might be reached by the Sherman Act. Its response to the argument was brief but extraordinarily significant. The court said:

"Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that 'every' contract, combination or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organ-

izations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us."

The court then referred to the case of *United States v. Amalgamated Council*, and quoted that portion of the decision which was given in the Plaintiffs' brief in support of the argument that the act reached labor combinations. It referred also to the decisions in the Pullman cases.

It seems fair to say that the statement of the Supreme Court concerning the congressional debates appears to have been based upon what the brief of the plaintiffs said, rather than upon a careful examination of the debates themselves. This was particularly unfortunate in view of the fact that in its history of the Sherman Act the counsel for the company made assertions which were misleading, as the following facts, already established, will show:

"(1) The provisos (there were two of them) exempting labor organizations, which were added to the Sherman bill, were attached to an anti-price raising measure. The Judiciary Committee bill, which became law, was not an anti-price raising measure, and probably did not seem to the Senate to require an exemption proviso on that account.

(2) The brief for the Plaintiffs gives the impression that the labor exemption provisos were omitted as a result of a debate in which 'propriety of discriminating in favor of labor organizations' was discussed. The fact is that the labor provisos were not separately omitted, but were discarded with the rest of the Sherman bill by the Judiciary Committee. The Sherman bill was sent to the latter committee not because the provisos troubled the Senate, but because so many impertinent, obstructive, and probably unconstitutional amendments had been added to it as to necessitate a thorough overhauling of the measure.

(3) There was only one senator who objected to the adoption of a labor exemption proviso. Numerous senators took the opposite view, and the Senate on two occasions adopted such a proviso.

(4) Despite the frequent references in the Senate

to the fact that the Sherman bill might reach labor and farmers' organizations; such a question was not mentioned in all the prolonged debates in the Senate and the House on the Judiciary Committee bill. The only reasonable explanation of this difference appears to be that the Sherman bill seemed to reach such organizations, whereas the bill actually passed did not, in the opinion of the members of Congress, do so.

(5) The brief for the plaintiffs asserted that it was significant that Congress, after the passage of the Sherman Act, had before it various proposals to exempt labor organizations, none of which it passed. It was declared further that there was special significance in the fact that this refusal to exempt labor followed the application of the act to union activities. The brief neglects to point out, however, that five of these six proposals were bills to make illegal combinations to prevent competition and to raise prices. These five bills, in other words, were not mere proposals to exempt labor from the Act of 1890. They were, on the contrary, proposals to strengthen the anti-trust legislation. They each had a labor exemption proviso because their framers considered such a proviso necessary in an anti-price raising bill."

In *Loewe* v. *Lawlor*, this court placed considerable emphasis on the fact that the "records of Congress show several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act and that all these efforts failed, so that the act remained as we have it before us." This statement by the Court followed the line of reasoning of counsel for Loewe Company in their brief that:

"It is significant that after the Sherman law was enacted bills were introduced in the Fifty-Second Congress, H. R. 6640, Sec. 1, 55th Congress * * * 56th Congress * * * 57th Congress * * * to amend the Sherman Anti-Trust Law so that it would be inapplicable to labor organizations, and while one of them (H. R. 10539, Sec. 7) passed the House in the 56th Congress, none ever became a law."

The same weight and significance should be given to the fact that after years of agitation, organized labor did secure an exemption from the operation of the Sherman law when it secured the passage of the Clayton Act. Its intent and purpose, as known to the entire country was to be relieved from the interpretation which they considered unwarranted, when the courts applied the Anti-Trust Act to them. Great emphasis has been placed by the Court upon the failure to secure passage of these subsequent bills, it would seem therefore that the passage of the Clayton Act which stated that labor unions shall not be regarded as an illegal combination or conspiracy in restraint of trade under the anti-trust laws, and which was intended to free labor unions from the burdens of the Sherman Anti-Trust Act, should be of equal importance and significance to this Court, particularly since only agreements, combinations, or conspiracy in restraint of trade violate the anti-trust law.

The importance of the passage of the Clayton Act by labor can be best illustrated by the utterance of the then President of the American Federation of Labor, Samuel Gompers, who hailed this act as labor's *Magna Charta*, (*Gompers, The Charter of Industrial Freedom—Labor Provisions of Clayton Anti-Trust Law*, 1914, 21 Am. Fed. 957).

As a matter of statutory construction it would seem clear that the Clayton Act was introduced and intended to remove certain restraints which had been placed upon labor by judicial interpretation of the Anti-Trust law.

A reading of Sections 6 and 20 of the Clayton Act at once leads to the conclusion that Congress intended that the Anti-Trust Act should no longer be applied to labor unions. The dissenting opinion of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes and Clark in *Duplex*

Printing Press Co. v. *Deering, et al.*, 254 U. S. 443, 478 to 481, clearly shows that the Clayton Act was intended to improve the legal status of unions.

From the foregoing, was not the statement that "the application which courts made of the Sherman Law and the Clayton Act in labor controversies is, indeed, a study in irony * * *" justified? (*Frankfurter & Green, The Labor Injunction*, p. 175 (1930).)

Mr. Justice Stone in his separate opinion in the *Bedford Co.* v. *Stone Cutters' Assn.*, 274 U. S. 37 at pages 55, 56, stated:

> "As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 178-180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. * * * These views, which I should not have hesitated to apply here, have now been rejected again largely on the authority of the *Duplex* case. For that reason alone, I concur with the majority."

Frankfurter & Green in *The Labor Injunction*, at page 176 commented that:

> "The Clayton Act was the product of twenty years of voluminous agitation. It came as clay into the hands of the federal courts and we have attempted a portrayal of what they made of it. The result justifies an application of a familiar bit of French cynicism: the more things are legislatively changed, the more they remain the same judicially."

This court has not hesitated to set aside old precedents without regard to the length of time that the decisions

have been upon the books, when it has been shown that these legal doctrines have been erroneously arrived at. (*West Coast Hotel Company* v. *Parrish*, 300 U. S. 379 (1937); *United States* v. *Bekins*, 304 U. S. 27; *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938), overruling *Swift* v. *Tyson*, 16 Pet. 1 (1842); *Graves* v. *New York*, 59 S. Ct. 595 (1939), overruling *Collector* v. *Day*, 11 Wall. 113 1871).)

It is respectfully submitted that a re-examination of the entire question by this court will result in the holding of the inapplicability of the Sherman Anti-Trust Act to the activities of labor unions.

II.

The Sherman Anti-Trust Act containing criminal provisions, is vague, indefinite and uncertain and is violative of the due process clause of the 14th Amendment of the United States Constitution.

There is no better settled rule of law than the principle that a penal statute must be sufficiently explicit so as to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an Act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connolly v. *General Construction Co.*, 269 U. S. 385, 391.

No one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statute, all are entitled to be "informed" as to what the State

commands or forbids. *Lanzetta* v. *State*, 59 S. Ct. 618, 619.

The indictment here charges that Leslie G. Goudie as President of the Joint Council, *an advisory body*, did "counsel, advise and direct" Local 753 and through the instrumentality of the Joint Council which is composed of the officers of each local union, he prevented the delivery of goods by members of unions affiliated with the Joint Council to places of business of independent distributors who refused to purchase fluid milk at prices fixed, (to take one count as an example).

Here the mere recital of the allegations in the indictment demonstrates their absurdity. How can an officer of an advisory body, which can meet with other union officials for the purpose of advising with each other only, be guilty of a crime merely because he is their presiding officer? Where Mr. Goudie, if we assume for the purpose of argument here, did give any advice, the others were free to take it or leave it as they pleased. We recite these facts to question how Mr. Goudie, a layman, could by looking at the provisions of the Sherman Anti-Trust Act know if he was violating it by doing the things he is charged with.

This Court in *Maple Flooring Ass'n* v. *United States*, 268 U. S. 563, 579, in discussing previous decision of this Court and their applicability said:

> "It should be said at the outset, that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this Court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

Mr. Chief Justice Taft and Mr. Justice Sanford dissented from the majority opinion of the Court in the above case as well as in the *Cement Manufacturers Association* v. *United States*, 268 U. S. 588, on the ground that in their judgment the evidence in each case brings it substantially within the rules stated in the *American Column Co.* v. *United States*, 257 U. S. 377 and *American Linseed Oil Co.* v. *United States*, 262 U. S. 371; in a separate opinion, Mr. Justice McReynolds dissented and stated that his belief was that the lower court was right and the decree should be affirmed. (Page 587.)

In the *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, this Court in passing upon the facts therein contained held that when a suit is brought under the Sherman Act there must be "a definite factual showing of illegality" and that the Government failed to show adequate grounds for an injunction in this case. Mr. Justice Hughes said on page 377:

> "We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the Government from seeking the remedy which would be suited to such a state of facts."

and this Court reversed the decree and remanded the case to the District Court with instructions to dismiss the bill without prejudice and that the Court shall retain jurisdiction of the cause and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act.

Thus we have in the *Maple Flooring* case a dissenting opinion by two justices which states that the factual situation between that case and the *American Column* case are identical and the majority of the Court disagreeing upon the factual situation. In the *Appalachian Coals* case, this court, with Mr. Justice McReynolds dissenting, stated that even after a voluminous record had been made that it could not determine whether the factual situation in that case *in advance* of the actual scheme going into operation was violative of the Sherman Anti-Trust Act. How then can a layman or for that matter any laboring man with ordinary school education be called upon to determine, at his peril, by merely a reading of the statute whether the acts that he is going to embark upon, will hold him liable to the criminal penalties of that act. How could Leslie G. Goudie in the instant case, by reading the provisions of the Sherman Act know, that if he did the things that the Government herein charges, as President of the advisory body he counseled, advised and directed others in the advisory body, over whom he had no control to bring his advice, counsel or direction into actual being, that he would be guilty of violating the Sherman Anti-Trust Act.

The standard required to uphold the validity of a civil statute is not as rigid as that required of a penal statute such as the Sherman Anti-Trust Act.

We are aware that this Court has passed upon the validity of this statute in *Nash* v. *United States*, 229 U. S. 373 (1913), yet this Court in *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, at 92 (1920), said with reference to the *Nash* case and the *Waters-Pierce Oil* case, 212 U. S. 86, which was the basis for the decision of the *Nash* case:

> "We need not stop to review them (referring to the Nash and the Waters-Pierce cases), however, first because their inappositeness is necessarily dem-

onstrated when it is observed that if the contention as to their effect were true, it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the constitution."

The Sherman Anti-Trust Act prohibits "every" contract combination or conspiracy in restraint of interstate trade, yet this Court has said:

> "Every agreement concerning trade, every regulation of trade, restrains." (*Appalachian Coals* case, 288 U. S. 344 at 361)

and the Court continued on and said that this is not a sufficient thing to bring it within the condemnation of the statute. If a transaction should result in influencing prices or reducing the number of competitors it might logically be considered a contract in restraint of interstate commerce. So would a combination to urge citizens in one city to patronize only home industries restrain interstate commerce. It is clear that such a literal construction of the act is both undesirable and dangerous and this Court has pointed out in *Appalachian Coals* case on page 361 that:

> "In applying this test, a close and objective scrutiny of particular conditions, and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition."

So this court, in a series of decisions, recognizes that not every contract affecting interstate commerce should

be considered unlawful, but only those whose effect was direct and not too small to be taken into account should be so regarded. (See *Hopkins* v. *The United States*, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604.)

The Sherman Act mentioned neither the size of the restraint nor the directness of its effect on interstate commerce. It prohibited every "such restraint". This court, in declining to condemn every restraint laid down the policy that every restraint must be judged by itself. Was it direct? Was it important? Was it intentional? In order to decide a case this court had to set up some standard of judgment apart from the mere existence of restraint itself. As applied to cases that have been brought before into the courts for injunctive relief, there is less danger for the application of the rule of reason than in the instant case which involves a criminal charge. A legislative Act which involves the forfeiture of a person's freedom by providing for punishment by imprisonment and fine should be such that anyone examining the act may be reasonably apprised as to which acts would be in violation of the act and which were not. He should not be guessed into being branded a criminal and it should not be left to the whim and determination of a jury as to whether acts done by a person which he considered legal did not meet with the same conclusion of a jury.

CONCLUSION.

It is the sincere prayer and appeal of labor to this court to free them from the unnatural and unintentional restraints placed upon them by the decisions of this court in its erroneous assumption that it was the intention of Congress that labor unions should be included within the purview of the anti-trust act, and

that this court should hold that the true intent and purpose of Congress was to exclude from the operation of the Sherman Anti-Trust Act and of the Clayton Act, labor unions, and through a proper interpretation of those acts will this court truly render a new *magna charta* for labor as was the belief when the Clayton Act was passed.

Respectfully submitted,

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